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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 627

VINCENT D. TODISCO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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No. .....

VINCENT D. TODISCO,

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UNITED STATES OF AMERICA,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming his conviction in the United States District Court, for violation of Section 201 of Title 18 of the United States Code.

Opinions Below.

No opinion was rendered in the District Court. The opinion of the Court of Appeals has not yet been reported. A copy of the opinion of the Court of Appeals is attached hereto in the Appendix to this Petition, and marked "Appendix 1."

Attached hereto and marked "Appendix 2" is the Order of Court of Appeals affirming the Judgment. Attached hereto and marked "Appendix 3" is the Order of the Court of Appeals denying Petition for Rehearing.

Jurisdiction.

Judgment of the Court of Appeals was entered on November 6, 1961. A Petition for Rehearing was denied on November 29, 1961. Jurisdiction of this Court is invoked pursuant to Title 28 of the United States Code, Section 1254, subsection 1.

Statutes Involved.

Section 201 of Title 18 of the United States Code provides as follows:

> "Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer, or employee or person acting for or on behalf of the United States, or any department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such

thing or imprisoned not more than three years, or both.

"This section shall not apply to violations of section 212 of this title."

Section 301 of Title 47 of the United States Code provides as follows:

"It is the purpose of this chapter, among other things, to maintain control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its

borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter."

Section 318 of Title 47 of the United States Code provides as follows:

"The actual operation of all transmitting apparatus in any radio station for which a station license is required by this Chapter shall be carried on only by a person holding an operator's license issued hereunder and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission; Provided, however, That the Commission if it shall find that the public interest, convenience, or necessity will be served thereby may waive or modify the foregoing provisions of this section for the operation of any station except (1) stations for which licensed operators are required by international agreement, (2) stations for which licensed operators are required for safety purposes, (3) stations engaged in broadcasting (other than those engaged solely in the function of rebroadcasting the signals of television broadcast stations), and (4) stations operated as common carriers on frequencies below thirty thousand kilocycles: Provided further, That

the Commission shall have power to make special regulations governing the granting of licenses for the use of automatic radio devices and for the operation of such devices."

Section 501 of Title 47 of the United States Code provides as follows:

"Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000.00 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000.00 or by imprisonment for a term not exceeding two years, or both."

Section 502 of Title 47 of the United States Code provides as follows:

"Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this chapter, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty

or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500.00 for each and every day during which such offense occurs."

Amendment IV of the United States Constitution provides as follows:

"The right of the people to be secure in their reasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Questions Presented.

1. Whether evidence obtained by a Federal officer who gained access to the private office of the Petitioner through false statements as to the purpose of his visits and who thereupon transmitted his conversations with the Petitioner by means of a radio transmitter operated in violation of Federal laws, which conversations were recorded by other Federal officers, was admissible against the Petitioner in a Federal Court criminal trial.

2. Whether the existence of a trespass is essential to constitute an unreasonable search and seizure in violation of the Fourth Amendment of the United States Constitution.

Statement.

A Complaint was filed on March 31, 1960, in the United States District Court for the Southern District of California, Northern Division, charging the Petitioner herewith with one count of attempted bribery of an agent of the Internal Revenue Service. The Complaint alleged that the crime occurred between the 16th day of March, 1960 and the 31st day of March, 1960. A Warrant for the arrest of the Petitioner was issued on March 31, 1960, but the Petitioner was not arrested until April 6, 1960. The Petitioner was never brought to trial on the aforesaid Complaint.

Thereafter, on June 15, 1960, a Grand Jury indictment in one count was returned against the Petitioner alleging that on or about the 6th day of April, 1960, he attempted to bribe the same revenue agent named in the original Complaint, in violation of Section 201 of Title 18 of the United States Code. The evidence secured by the Federal Agents and the conduct of the Federal Agents between March 31, 1960, the date of issuance of the original Complaint against the Petitioner, and April 6, 1960, the date of the arrest of the Petitioner, is the subject of the objections and motions addressed to the lower Courts and involve the questions of Constitutional law which constitutes the gravamen of the Petition herein for Writ of Certiorari.

The following facts relative to the conduct of the Federal officers and the Petitioner herein are uncontroverted and are not in conflict and are supported by the record in this case.

(1) The Petitioner is an attorney at law and maintained his offices in Fresno, California.

(2) For approximately one year prior to the date of his arrest, Petitioner had represented a client, one Mr. Jarvis, in connection with his efforts to negotiate a compromise and settlement of a tax claim against him. During the course of the negotiations with the government, a Revenue Agent named Earl K. Oto was assigned to the case. During that year, Mr. Oto had numerous conferences with the Petitioner in the course of the negotiations to settle the Jarvis case. Most of the conversations between the Petitioner and Mr. Oto took place at the Petitioner's law offices.

(3) The Petitioner's law offices consisted of a reception room in which a receptionist worked and which area was open to the public, and the Petitioner's private law office to which entry could be secured only with permission of the Petitioner.

(4) During the latter part of March 1960, Mr. Oto reported to his superiors that the Petitioner had offered him a bribe to recommend settlement of the Jarvis case.

(5) On March 31, 1960, Mr. Oto's immediate superior filed a Complaint in the United States District Court charging the Petitioner with violation of Section 201 of the United States Code, Title 18. [Deft. Ex. I.] On the same day, a Warrant was issued for the arrest of the Petitioner. The Warrant of Arrest was not served upon the Petitioner until April 7, 1960.

(6) Between March 31, 1960 and April 7, 1960, Mr. Oto called at the Petitioner's office on several occasions stating to him that he was there to discuss settlement of the *Jarvis* case. Mr. Oto ad-

mitted that during this period of time and on the occasions of his visits to Petitioner's office, he was not negotiating in good faith with Petitioner on the *Jarvis* case. He testified that he had no intention of acting upon or receiving a compromise tax offer in the *Jarvis* case, but that his presence at the Petitioner's office was for the purpose of securing recorded evidence to support the Complaint which had been filed against the Petitioner. He knew of the issuance of the Complaint and Warrant but did not tell the Petitioner about it. [R. 235, 236, 237, 238.]

(7) Petitioner was not aware that a Complaint had been filed against him nor that a Warrant had been issued for his arrest.

(8) On three (3) of his visits to Petitioner's office, Mr. Oto carried, concealed on his person, a radio transmitter. [R. 51, 122, 126, 146, 171, 180.] All of the conversations which took place between Mr. Oto and the Petitioner in his private office were transmitted by the radio transmitter operated by Mr. Oto and were received and recorded by other Federal officers parked in an automobile some distance away. [R. 122, 126, 179.]

(9) The agent never told the Petitioner that his conversations were being transmitted by a radio carried by Mr. Oto, nor that the conversations were being recorded at a distant place. [R. 51, 146, 180.]

(10) Petitioner never knew nor did he consent to the use of a transmitter in his private office by Mr. Oto nor did he consent to the transmission of radio signals from his office nor the recordation

of the same by other Federal officers. [R. 51, 146.]

(11) At no time did Mr. Oto ever apply for, nor had he ever been issued, nor did he ever hold, either a radio operator's license nor was the transmitter which he carried and used licensed by the Federal Communications Commission. [R. 122, 172, 179, 180.]

Immediately upon learning of the existence of the recordings and the Government's intention to offer the same in evidence, the Petitioner herein moved to suppress the recordings as evidence under Federal Rules of Criminal Procedure. [R. 52, 55 to 63, 73, 80, 95, 96, 99, 128, 148, 149, 161, 162, 173, 174, 180, 181.] The Motions to Suppress the recordings were overruled by the Trial Court. [R. 74, 101, 161, 162, 174, 181.] When the recordings were subsequently offered in evidence, the Petitioner made objections thereto. [R. 52, 55 to 63, 73, 80, 95, 96, 98, 99, 128, 148, 149, 161, 162, 173, 174, 180, 181.] The grounds for the Petitioner's Motions to Suppress the recordings and the grounds of his objections to the introduction of the recordings in evidence were:

1. That the acquisition of this evidence was secured by Government agents in violation of the Petitioner's Constitutional rights under the Fourth Amendment of the Constitution of the United States.

2. That the evidence was obtained illegally by the Government in that Government agents secured the evidence in the course of the commission of a Federal

crime, to wit, the illegal use of unlicensed radio transmitter station by an unlicensed operator in violation of Sections 301 and 318 of Title 47 of the United States Code, and which said acts are denounced as a crime by Sections 501 and 502 of Title 47 of the United States Code.

3. A further objection was made to the introduction of the recordings in evidence. It was that the recordings themselves were so fragmentary and unintelligible so as to render them of no reliable probative effect. The objections to the admissibility of the recordings on these grounds were likewise overruled by the Trial Court. [R. 148, 149, 161, 162, 173, 181.]

The only evidence offered or received against the Petitioner with reference to the alleged bribery offer, was contained in the recordings. Mr. Oto, although present in Court, did not offer any testimony as to his personal knowledge or recollection of the alleged bribery offer or of his conversations with Petitioner with reference thereto.

The jury convicted the Petitioner and the Trial Court thereafter sentenced the Petitioner to imprisonment for a year and a day. The sentence was thereupon suspended and the Court granted the Petitioner probation on the condition that he pay a fine of $500.00. Petitioner appealed from the Judgment.

The Court of Appeals affirmed the conviction and thereafter denied a Petition for Rehearing.

Reasons for Granting the Writ.

The scientific advances made during the past twenty five (25) years in the field of radio and electronic eavesdropping and the increasing frequency of the use by Federal officers of electronic devices and the resulting threat to the security of people to be secure in their homes and offices from unreasonable auditory searches by Federal officers, commend the problems posed in this case, to review by this Court. A serious basic question of Constitutional law of widespread general interest is posed by the facts and Judgment of the Court in this case. A further serious problem relating to the matter of regulatory control by this Court of lower Federal Courts with reference to the use of illegally secured evidence is also present in this case and commends the attention of this Court.

This Court has heretofore considered related aspects of problems inherent to the use of electronic devices for eavesdropping by Federal agents. In the case of *Goldman v. United States,* 316 U. S. 129, this Court held that the use of a detectaphone was not a device falling within the jurisdiction of the Federal Communications Commission and that its use was not prohibited by any provisions of the Federal Communications Act. The Court held that evidence not secured by means of a trespass nor by violation of any of the provisions of the Federal Communications Act, was not rendered inadmissible merely because it was secured by electronic eavesdropping devices.

On the other hand, this Court held in *Nardone v. United States,* 302 U. S. 379, that where the technique of eavesdropping is in violation of Federal law, evidence secured thereby is inadmissible.

In *On Lee v. United States*, 343 U. S. 747, this Court held that where eavesdropping evidence was secured without a trespass, the evidence so secured was admissible. In the *On Lee* case, this Court was called upon to determine whether or not the Federal agent's presence in On Lee's laundry constituted a trespass. This Court concluded from the facts before it that the Federal agent being an old acquaintance of On Lee and visiting him in an area to which the general public was invited, was present in his laundry with his knowledgeable invitation and consent and that therefore no trespass occurred. This Court, in the *On Lee* case, also carefully considered whether or not the radio transmission by the Federal agent was in violation of Section 605 of the Federal Communications Act. This Court concluded that the transmission was not in violation of the Act. It is respectfully submitted that had this Court found that the transmissions constituted a violation of Section 605 of the Federal Communications Act, it would have rejected the admissibility of such evidence irrespective of whether the agent was a trespasser or not. The Court assumed that the agent was legally in possession of the radio transmitter and was fully authorized to operate the same. No question of illegality with reference to the use of the transmitter was involved in the *On Lee* case nor was this aspect considered by the Supreme Court.

In 1961, this Court again considered this problem in the case of *Silverman v. United States*, 365 U. S. 505. In the *Silverman* case, the eavesdropping evidence was secured by use of a detectaphone of a type similar to that used in *Goldman v. United States*. In the *Silverman* case this Court will recall the unit was affixed to a wall by means of a spike. The Court in

that case rejected the offered evidence. The Court, in that case, distinguished the facts of the case with the cases of *Goldman* and *On Lee*. In the words of this Court, the distinction was as follows (at p. 510):

> "But in both *Goldman* and *On Lee*, the Court took pains explicitly to point out that the eavesdropping had not been accomplished by means of an unauthorized physical encroachment within the Constitutionally protected area."

As a result of the factual distinctions noted by this Court in these cases, the broad area of the Constitutional protection afforded by the Fourth Amendment has necessarily become confused and unclear. The Court of Appeals in the case at bar reflected the area of confusion. The Court of Appeals has made the broad Constitutional rights of the Petitioner turn on a factual matter which falls in the twilight zone between the *On Lee* case and *Silverman* case. The uncontroverted facts of this case are identical to neither the *On Lee* or *Silverman* case. Unlike the *Silverman* case, no spike was driven into the wall of the Petitioner's office. The case at bar differs likewise materially from the facts of *On Lee*. Only by extending the legal effect of *On Lee* to facts materially different in the case at bar was the Court of Appeals able to support Petitioner's conviction on authority of the *On Lee* case.

The Court of Appeals in this case in determining whether or not the Petitioner was deprived of his Constitutional right under the Fourth Amendment, made the decision turn on whether or not a trespass occurred in this case. The Court of Appeals indicated that the evidence would be inadmissible under authority of the *Silverman* case if a trespass occurred, while on the other

hand, if no trespass occurred, then the evidence would be admissible under the theory of *On Lee*.

The uncontroverted facts which Petitioner herein believes distinguishes this case from the *On Lee* case are as follows:

1. The evidence to which objections were made [Exs. "6A", "7A" and "8A"] was secured by the Government agents after a complaint had been filed against the defendant, but prior to the time of his arrest and prior to the time of his knowledge of the issuance of such Complaint. [R. 235, lines 21-25; 236, lines 8-10.] This was not the situation in *On Lee*. No Complaint was pending in *On Lee* when the transmissions were made.

2. The conversations which were broadcast by means of the radio transmitter did not occur in a place to which the public was invited generally, but occurred in the confines of the Petitioner's private law office. [R. 231, line 10, to p. 238, line 6.]

In the *On Lee* case, however, the Court found that the Government agent entered the public area of the defendant's business to which the public had open entry and to which it was generally invited. The Court found he was invited impliedly to be present in the public area of On Lee's laundry. The sanctity of an attorney's private office cannot, we think, realistically be compared to the public area of the defendant's laundry to which the public was generally invited as was the factual situation in the *On Lee* case.

3. In *On Lee*, the Government agent was an old acquaintance of On Lee and was welcomed by him as an old acquaintance. Such a fact is not present in this case. Here Mr. Oto and the Petitioner were not friends

but mere business acquaintances whose contacts related solely to a tax case handled by the Petitioner. Their relationship was strictly one of two adversary parties to a tax case. Petitioner had no reason nor cause to invite Mr. Oto to his private office except to conduct their mutual business.

4. In the *On Lee* case, the Government agent did not affirmatively falsify the reason for his presence on the defendant's premises. No reason or excuse was given by the agent to gain access to On Lee's place of business. Such was not the situation in this case. Mr. Oto in this case affirmatively and falsely represented to the Petitioner that the reason for his visit to Petitioner's office between March 31, 1960, and April 6, 1960, was to continue negotiations for settlement of the *Jarvis* tax case. Mr. Oto admitted under oath that he had no intention of acting upon or receiving an offer of compromise and settlement or otherwise dealing in good faith with Petitioner on account of the *Jarvis* case. He came to Petitioner's office under instructions from his superior officers for the express purpose of securing evidence to be used against the Petioner on a then existing and pending criminal Complaint and not to deal in good faith on the *Jarvis* case. [R. 231, to p. 238.]

5. There was no evidence before the Court in the *On Lee* case that the Government agent was operating the radio transmitter in violation of any Federal law or that he was committing a violation of any law by operating a transmitter on On Lee's premises. The evidence in this case was uncontradicted that Mr. Oto operated the transmitter in Petitioner's offices without a license and in violation of Sections 301, 318, 501 and 502 of Title 47 of the United States Code.

If Mr. Oto was present in the Petitioner's offices with his consent, such consent was secured by trickery and false representations.

A consent to enter a man's premises obtained through false representations or trickery is not a legal and valid consent.

> *People v. Brittain*, 142 Cal. 8, 75 Pac. 314;
> *People v. Garrow*, 130 Cal. App. 2d 75, 278 P. 2d 475.

The foregoing facts, it is respectfully submitted, remove the case at bar from the factual pattern of the *On Lee* case. Only by extending the application of *On Lee* to these new facts can it be considered to control over the *Silverman* case.

We think Mr. Oto's presence in Petitioner's private office constituted a physical trespass, if one be necessary, sufficient to constitute a violation of Petitioner's rights under the Fourth Amendment. While the Court in the *Silverman* case did not expressly overrule *On Lee* it indicated that it would not extend its application to other factual circumstances.

Notwithstanding the expression of this Court in the *Silverman* case that it was not called upon to overrule the holding in *On Lee*, a serious question exists as to what extent *On Lee* is still the law of the land. The decision in *On Lee* was by a 5 to 4 divided Court. The Justice who wrote the majority opinion is no longer on the Court, nor are any other of the Justices who joined in the majority Opinion with the exception of Mr. Justice Clark. Mr. Justice Clark in June, 1961 in the case of *Mapp v. Ohio*, 367 U. S. 643 indicated he too now adheres to the views of the dissent.

We respectfully submit that the questions presented by the case at bar should be reviewed and if possible this Court should settle the law in the areas of uncertainty. For an example of the uncertainty which exists see 75 Harvard Law Review 184.

Even if it be conceded for purposes of argument that Mr. Oto's physical presence in the Petitioner's private office did not constitute a trespass, serious doubt is cast by the *Silverman* case as to whether or not a physical trespass is a condition precedent to invoke the protection of the Fourth Amendment. The Petitioner's right of privacy in his office is, we submit, protected by the Fourth Amendment whether or not a trespass occurred.

The case of *Olmstead v. U. S.*, 277 U. S. 438, indicated that a trespass was an essential element to constitute a search and seizure as unreasonable under the Fourth Amendment. The *Olmstead* case is of doubtful present binding force. Mr. Justice Douglas in his dissenting opinion in *On Lee*, adopted the dissenting Opinion of Mr. Justice Brandeis in *Olmstead*. In 1961, in *Mapp v. Ohio*, Mr. Justice Clark joined Mr. Justice Douglas in the dissenting view of Mr. Justice Brandeis in the *Olmstead* case. It thus appears that the majority of the Justices of the present Court may now favor the dissenting opinion of *Olmstead v. U. S.*, rather than the majority opinion.

The Court of Appeals in the case at bar indicated that the private office of the Petitioner was not a protected area unless a trespass was present. This is, we think, in conflict with at least two cases decided by this Court.

The protection of the Fourth Amendment has long been settled to extend to offices, whether used for the transaction of legal or illegal business.

Go-Bart Importing Co. v. U. S., 282 U. S. 344, 357;

Gouled v. U. S., 255 U. S. 298, 307.

This serious Constitutional question commends the consideration of this Court.

A second fundamental question is involved here. It relates to the power of the Supreme Court of the United States to regulate the procedure of the Federal Courts in connection with the use and admissibility of evidence secured by Federal officers through illegal means. The case at bar is indistinguishable in principle, in law, and in basic operative facts from the case of *Nardone v. United States*, 302 U. S. 379. The Judgment of the Court of Appeals in this case is directly contrary to the holding of the Supreme Court in the *Nardone* case. In the *Nardone* case, this Court ruled inadmissible evidence obtained by Federal agents acting in violation of Section 605 of the Federal Communications Act, (47 U. S. C. Sec. 605.) (Wiretapping.) The Court, in the *Nardone* case, pointed out that the conduct prohibited by Section 605 of the Federal Communications Act was made a crime by virtue of sanctions and penalities provided in Sections 501 and 502 of the same act and that such prohibition applied to Federal government agents as well as all other citizens.

In the case here on appeal, the evidence is uncontradicted that Federal officers in operating an illegal and unlicensed radio station transmitter without any

radio operator's license were acting in violation of Sections 301, 318, 501 and 502 respectively of the Federal Communications Act. (47, United States Code.) The acts of which the Federal officers were guilty in this case were made a Federal crime by the provisions of Sections 501 and 502 of the Federal Communications Act which likewise rendered the conduct of the Federal officers illegal in the *Nardone* case. Violations of Sections 301 and 318 as well as Section 605 of the Federal Communications Act are denounced as Federal crimes by Sections 501 and 502 of the same act. In *Nardone v. United States,* this Court held a violation of Section 605 of the Act rendered the evidence secured thereby inadmissible.

This Court in the *Nardone* case indicated that it was not the right of a party to a telephone conversation to be free from eavesdropping which was the basis for the statutory prohibition against wire tapping, but it was the necessity of the Government to protect generally the nation's system of communications. In the case at bar, Sections 301 and 318 of the Federal Communications Commission Act are part of the same statute whose purpose it is to protect the national system of communications. If unlicensed persons are permitted to operate unlicensed radio stations, the same danger to the national communication systems would result as from the violation of Section 605 of the Act. It is respectfully submitted that the Petitioner herein had as much right to be protected from illegal transmissions being made from his private office in violation of Sections 301, 318, 501 and 502 of the Federal Communications Act as the Petitioner in the *Nardone* case had to be free from eavesdropping conducted by

Federal agents in violation of Section 605 of the same Federal Communications Act. No logical reason in law appears why the rule of the *Nardone* case should not render evidence secured in this case equally inadmissible.

If this Court has changed its thinking with reference to the admissibility of evidence secured illegally by Federal officers since the *Nardone* decision, or has departed from its previously announced holding in *Weeks v. United States*, 232 U. S. 384, *Gouled v. United States*, 255 U. S. 298 and *Walder v. United States*, 347 U. S. 62, then this is an appropriate case in which the Court may disclose such a change of thinking. Until, however, this Court announces such a change of policy, the *Nardone* case is controlling and the decision of the Court of Appeals in this case is squarely in conflict therewith.

In the exercise of its supervisory authority over criminal justice in Federal courts, this Court should hold we submit, that the contested evidence should have been rejected.

McNabb v. United States, 318 U. S. 332.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Dated December, 1961.

MAURICE J. HINDIN,

Attorney for Petitioner.

APPENDIX 1.

Opinion of the United States Courts of Appeals for the Ninth Circuit.

Vincent D. Todisco, Appellant, vs. United States of America, Appellee. No. 17,311. Nov. 6, 1961.

Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

Before: Hamlin, Merrill and Koelsch, Circuit Judges. Merrill, Circuit Judge.

Appellant, following jury trial, was adjudged guilty of attempting to bribe an Internal Revenue agent in violation of 18 U. S. C. §201. He has appealed from that judgment.

Appellant is an attorney at law practicing in Fresno, California. In March, 1960, he was representing a client in attempting to negotiate a compromise settlement of tax liability as assessed by the tax court. In these negotiations the Internal Revenue Service was represented by Agent Earl K. Oto.

In the course of negotiations appellant had made several statements to Oto assuring him of rewards in the event of a favorable settlement. These overtures were reported by Oto to his supervisors. On March 29 and 31 and on April 1, 4 and 5, 1960, conversations took place between appellant and Oto in the former's law office, during all of which Oto was equipped with a Fargoe device, being a miniature radio transmitter. The conversations in their entirety were transmitted and recorded at the point of reception. The upshot of these conversations was an agreement that upon Oto's acceptance of a settlement appellant's fee of $500.00 was to be split between them.

The agreement was never carried through, but on April 6 appellant was arrested.

On trial appellant's position was that commencing in the fall of 1959 Oto had been soliciting him for a bribe and that he had been leading Oto on; that Oto had informed the revenue service only after he became alarmed and suspicious. The government's case rested almost entirely upon the tape recordings of Oto's conversations with appellant. Over appellant's objections and motion to suppress, these tapes were received in evidence.

Appellant's principal contentions upon this appeal relate to the admissibility of these tapes. Upon three grounds appellant contends that they were inadmissible.

First, appellant contends that the recording of his conversations violated the Fourth and Fifth Amendments of the United States Constitution.

In the eavesdropping area constitutional problems are usually couched in terms of whether the conduct under scrutiny amounted to an unlawful search and seizure. The answer to this question in turn, in this area, is largely dependent upon whether entry upon the premises amounted to trespass. That it did not in the case before us is established by On Lee v. United States, 1951, 343 U. S. 747.

In that case an old acquaintance of the defendant who was, without the defendant's knowledge, serving as an undercover agent of the United States Bureau of Narcotics, and who was equipped with a hidden device for radio transmission, engaged defendant in conversation in defendant's laundry. Damaging admissions were thus secured and recorded. They were held admis-

sible. The court emphasized that the agent was present with the defendant's consent and rejected the theory (also advanced by this appellant) that the true purpose of the visit, unknown to the defendant and unconsented to by him, constituted the agent's presence a trespass *ab initio*.

Appellant asserts that the decision of the Supreme Court in Silverman v. United States, 1961, 365 U. S. 505, demonstrates that the thinking of the court respecting eavesdropping has undergone a change since its decision in On Lee.

In Silverman a spike was driven into the wall of defendant's premises by means of which the police were able, through an electronic device, to reach and record defendant's conversations within the room. This evidence was held inadmissible.

On Lee was expressly distinguished, however. The court stated at page 510:

> "But in both Goldman and On Lee, the Court took pains explicitly to point out that the eavesdropping had not been accomplished by means of an unauthorized physical encroachment within a Constitutionally protected area."

The court's principal concern in the eavesdropping cases is the protection of the right of privacy. As stated in Silverman v. United States, supra, at page 511:

> "The Fourth Amendment, and the personal rights which it secures have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

No such right is threatened here. In discussing the subject of wiretapping with the consent of one party to the conversations, Professor Schwartz pointed out in "On Current Proposals to Legalize Wiretapping," 103 Pennsylvania Law Review 157, 166:

> "The risk to which the non-consenting party is subjected is not really a wiretapping risk but the risk of betrayal by the other party who acquiesced in the tap, a risk inherent in any form of communication with him."

Bradley and Hogan, in "Wiretapping: From Nardone to Benanti and Rathbun," 46 Georgetown Law Journal 418, 440, state:

> "If the recipient of the information is free to betray the confidence of the other party, what difference should the form of the betrayal make? If he can repeat what he hears, if he can make notes of what he is told, if he can make a record of the conversation, is it not logical that he ought to be allowed to let a third person do these things for him?"

The right which appellant here asserts would seem to be little more than the right to rely upon Oto's apparent inability to produce proof beyond his own testimony of the substance of the conversation in which he engaged with appellant. This has little relation to an intrusion upon privacy which is the problem at the heart of the constitutional issues presented by eavesdropping.

We conclude that no constitutional right of appellant was violated by the manner in which the tapes were secured or by their admission into evidence.

The second ground upon which appellant rests his contention that the tapes were inadmissible is that the evidence was secured contrary to federal statute. 47 U. S. C. §301 provides that "no person shall use or operate any apparatus for the transmission of * * * communications * * * by radio * * * except * * * with a license in that behalf granted under the provisions of this chapter." Oto had no license.

The United States asserts that this section cannot be read to apply to the use of a Fargoe device. This issue we do not reach. Even if a license be required for the operation of such a device, the failure to secure one can hardly be held to render inadmissible evidence secured by such an operation. Where illegally obtained evidence is held inadmissible, it is in those cases in which it was obtained in violation of some federally protected right of the defendant and where public policy against its admission can be said to exist. As stated in Nardone v. United States, 1939, 308 U.S. 338, 340:

> "Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land. In a problem such as that before us now, two opposing concerns must be harmonized: on the one hand, the stern enforcement of the criminal law; on the other, protection of that realm of privacy left free by Constitution and law but capable of infringement either through zeal or design. In accommodating both these concerns, meaning must be given to what Congress has written, even if not in explicit language, so as to effectuate the policy which Congress has formulated."

Here the purpose of the licensing law is to prevent interference with radio communications. No right of the defendant was violated by the lack of license. No policy against admission of evidence secured by the radio operation can be said to arise from such lack. We conclude that operation of the Fargoe device without license constituted no bar to the admissibility of the tapes.

The third ground for appellant's attack on the admissibility of the tapes is that no proper foundation was laid in that they were identified only by Oto and that the officer on the receiving end did not testify. Further, appellant contends that the recordings were so fragmentary and unintelligible as to render them of no reliable probative force.

In Monroe v. United States, D.C. Cir., 1956, 234 F. 2d 49, 55, it was held:

> "Unless the unintelligible portions were so substantial as to render the recording as a whole untrustworthy the recording is admissible and the decision should be left to the sound discretion of the judge.
>
> "Here the trial judge followed the correct procedure of having the records played out of the presence of the jury so that he could rule on any objection raised by defendants before the jury heard the recording."

In this case, prior to the playing of any recording before the jury, the trial judge listened to the recordings out of the presence of the jury and had Oto identify the voices which were heard on the tapes. In each instance Oto identified the voices that were to be heard, identified the place where the recording was made and

the date and the persons present. Furthermore he testified in each instance that these recordings were accurate in that he had listened to them shortly after the conversation took place. With but few exceptions it would appear that the tapes have been transcribed in their entirety.

No abuse of discretion appears. The probative force was for the jury to assess.

We conclude that it was neither error nor abuse of discretion to admit the tapes in evidence.

Appellant next contends that the course of conduct established by the evidence constituted entrapment as a matter of law.

The issue of entrapment was presented to the jury. Appellant asserts that there were no factual issues to be decided by the jury upon this question and that the judge should have ruled upon it in his favor. We disagree. An essential issue was whether Oto had, as appellant contended on trial, first planted the idea of a bribe in appellant's mind. We cannot say that this fact so conclusively appears from the record as to render the issue of entrapment one of law.

Appellant contends that to make use against him of his conversations with Oto is to violate his right against self-incrimination. But appellant was not confessing to a crime. He was committing one. Even if there were self-incrimination, it was wholly voluntary. There is obviously no merit to this contention.

Finally, appellant contends that the district court committed error in denying his motion for a bill of particulars prior to trial. He points out that on March 31, 1960, a complaint was filed against him by a fed-

eral agent charging him with attempted bribery; that he was never prosecuted on this complaint; that he was subsequently indicted on one count charging an offense committed "on or about April 6, 1960." He asserts that this created an uncertainty as to the scope of the transactions or conversations upon which the government intended to rely and that it was to meet this situation that he moved for a bill of particulars. That motion was opposed by the United States and denied by the district court.

The United States denies that this constituted abuse of discretion. Even assuming that it did, however, we find no prejudice to appellant. He was fully aware at all times of the scope of Oto's participation and the potential scope of his testimony. He listened to the recordings upon which the government proposed to rely before the first witness was called. We conclude that failure to grant a bill of particulars does not warrant reversal.

Affirmed.

(Endorsed) Opinion Filed Nov. 6, 1961.

Frank H. Schmid, Clerk.

APPENDIX 2.

Judgment.

United States Court of Appeals for the Ninth Circuit.

Vincent D. Todisco, Appellant,

United States of America, Appellee. No. 17311.

Appeal from the United States District Court for the Southern District of California, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Northern Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed & entered November 6, 1961.

APPENDIX 3.

Order Denying Petition for Rehearing.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Wednesday, Nov. 29, 1961.

Before: Hamlin, Merrill and Koelsch, Circuit Judges.

On consideration thereof and by direction of the Court, It Is Ordered that the petition of appellant, filed November 24, 1961, and within time allowed therefor and by rule of court, for a rehearing of above cause be, and hereby is, denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 627

VINCENT D. TODISCO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief Amicus Curiae of the American Civil Liberties Union of Southern California.

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I.

Certiorari should be granted in order to afford this court an opportunity to reconsider On Lee v. United States, 343 U. S. 747, to overrule it and establish as the law the principles urged by the dissenting opinions in that case and in Olmstead v. United States, 277 U. S. 438, or, at the least, to limit the application of On Lee 2

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 627

VINCENT D. TODISCO,

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UNITED STATES OF AMERICA.

Brief Amicus Curiae of the American Civil Liberties Union of Southern California.

This brief is being filed with the consent of the parties pursuant to Rule 42(1) of this Court. The letters of consent are being sent to the Clerk of this Court concurrently with the forwarding of this brief.

Interest of Amicus Curiae.

The American Civil Liberties Union of Southern California is a voluntary membership organization dedicated to the preservation and effectuation of the personal rights guaranteed by the Constitution. (*Cf. Rochin v. California*, 342 U. S. 165; *Mapp v. Ohio*, 367 U. S. 643). Because the instant case presents an important question involving the right to freedom from unreasonable search and seizure, it files this brief *amicus*.

I.

Certiorari Should Be Granted in Order to Afford This Court an Opportunity to Reconsider On Lee v. United States, 343 U. S. 747, to Overrule It and Establish as the Law the Principles Urged by the Dissenting Opinions in That Case and in Olmstead v. United States, 277 U. S. 438, or, at the Least, to Limit the Application of On Lee.

The Petition for Writ of Certiorari makes a forceful showing, we believe, for the proposition that the instant case is sufficiently different from *On Lee* so that that case should not be permitted to control here. Just as in *Silverman v. United States*, 365 U. S. 505, 512, where this Court "decline(d) to go beyond *(Goldman v. United States*, 316 U. S. 129), by even a fraction of an inch," so here the Court should decline to permit *On Lee* to be extended beyond its own facts. On this basis, certiorari could properly be granted and the decision below reversed.

We desire to urge herein, however, the broader point, also discussed in the Petition for Writ of Certiorari, that the trend of the decisions of this Court has been such that *On Lee* no longer represents the law and, in any event, should not be the law and should be overruled. We submit that the trespass concept as the *sine qua non* for adjudging Fourth Amendment rights is inadequate for, and does not face up to, the problems of today and, perforce, tomorrow. More in keeping with the times is the concept of the invasion of privacy.

In *Olmstead v. United States*, 277 U. S. 438 (1921), a 5-4 decision involving telephone wire tapping, Mr. Justice Brandeis foresaw the kind of a case presented by

the instant and the *On Lee* cases, and even beyond. In his dissent he said (*277* U. S. at 472, 473, 474):

> "'We must never forget,' said Mr. Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L. ed. 579, 601, 'that it is a Constitution we are expounding.' . . . Clauses guaranteeing to the individual protection against specific abuses of power, must have a . . . capacity of adaptation to a changing world . . . (quoting from Weems v. U. S., 217 US 349, 373 re changing institutions). . . ."

Page 473:

> ". . . 'time works changes, brings into existence new conditions and purposes.' Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet."

Page 474:

> ". . . The progress of science in furnishing the government with means of espionage is not likely to stop with wire-tapping. Way may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. . . ." (Quoting from *Boyd v. U. S.*, 116 US 616, 627-630: 'It is not the breaking of his doors and the rummaging of his drawers, that constitutes the essence of the

offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property.')"

The time envisioned by Mr. Justice Brandeis in *Olmstead* is already here or is rapidly approaching.[1] The instruments used in *Goldman* and *Silverman* have already been surpassed. No longer is it necessary to place an instrument on the other side of a party wall or to insert a spike therein.

In the Hearing before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 85th Cong., 2d Sess., on Wiretapping, Eavesdropping, and the Bill of Rights, May 20, 1958, pp. 17 and 18, instruments (parabolic microphones and tubular microphones) are described as being even then in existence by which "(o)ne could be pointed from one office window to another across the street and pick up the conversation inside the second office." (P. 17.) Note was taken of such, or even a more effective, device by Mr. Justice John Vincent Barry of the Victoria, Australia, Supreme Court in his Article, "An End to Privacy," 2 Melbourne Univ. L.R. 443. Knowledge of American electronic prowess has not been confined

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[1] *Cf.* Note by John C. Love, Jr., commenting on the trial court decision in *Silverman*, 31 Miss. L.R. 306, 308:

". . . in the effort to allow officers more freedom in obtaining evidence by the use of scientific equipment, the fundamental right of privacy has been further infringed upon, as Mr. Justice Brandeis predicted in his dissent in *Olmstead* and as the other three justices who dissented in *Olmstead* and the three justices who dissented in *Goldman* seemed to fear."

to these shores. Justice Barry quotes from a 1957 Report of the California Senate Judiciary Committee (p. 449):

> "'The electronic tools for monitoring private conversations are both subtle and literally, far reaching. Their amoral physical capabilities suggest, without need for elaboration, the extent to which the power of surveillance is outstripping the walls of personal privacy. . . .'"

Continuing from the California Senate Judiciary Committee Report, Justice Barry quotes (p. 450):

> "'Another most unusual type of equipment is the so-called shotgun microphone. Specially constructed of different length pipes, it can be aimed at a location up to several hundred yards away and listen in on even a hushed conversation. It can thus overhear conversations in such diverse places as a boat out on a lake, or a room in a house or skyscraper across the street. . . .'"[2]

Says Justice Barry (p. 453):

> "This disturbing volume[3] shows how far modern societies have moved along the road to the nightmarish society described by George Orwell in the novel *1984*. . . ."

As said by Professor Kamisar (*The Wire Tapping-Eavesdropping Problem: A Professor's View*, 44 Minn. L.R. 813, 892):

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[2]The same instrument is described in Miller, *The Open Ear. Surreptitious Conversation Monitoring Devices*, 12 Syracuse L.R. 361, 370.

[3]Referring to the book "The Eavesdroppers", by Dash, Knowlton and Schwartz (Rutgers Univ. Press, 1959).

". . . Nowhere, it seems, is one quite safe from the eavesdropper. Not in one's home or office or automobile. Not even in one's bathroom with the shower turned on!"

The trespass theory, therefore, does not solve the problem at hand. *Cf. Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law,* 49 Cal. L.R. 474, 483:

"Since the Supreme Court has in more than one case attempted to free the fourth amendment from the shackles of the common law of trespass it is not too much to hope that when the Court again turns to this problem it will, perhaps through the use of its rulemaking power, fashion a more satisfactory rule. . . ."

And see Note, 27 Geo. Wash. L.R. 735, 740 by George W. Warlick, commenting on the trial court's decision in *Silverman:*

"While it is submitted that it would be possible for the instant decision to be reversed without over-ruling *Goldman,* and that such a result would be of value by clearly enunciating a policy prohibiting searches involving trespasses to homes or offices, it must be realized that the result would be of dubious value in the particular area of eavesdropping. In view of the rapid advances in electronics, it appears that science is capable of developing even more ingenious instruments which will operate effectively without penetrating, or indeed, without touching a wall. It would be ludicrous to suggest that a victim of electronic eavesdropping is any less aggrieved because his wall was not penetrated. It is submitted that the in-

stant case emphasizes the desirability of the overruling of *Goldman*, for while the instant case presents a clear example of an unreasonable search, it differs from *Goldman* only by a matter of a few inches and a technicality. No reasonable distinction can be drawn between the injuries suffered by the defendants in the two cases. In determining the legality of electronic eavesdropping, the courts should look not to the methods, but to the results of the eavesdropping; and if it is determined that the privacy of a person's home or office has been invaded without a warrant, then evidence obtained should be suppressed."

See also: Smith, *Unreasonable Search and Seizure—Evidence Obtained by Electronic Listening Devices*, 24 Ga. B. Jl. 135, 138 (discussing this Court's decision in *Silverman*):

"The direction of the line that has emerged from successive cases in this area is not clear. In the future more cases will come forth involving far more strange and technical electronic devices. How far can the courts go in attempting to reconcile or decide these cases on the element of trespass? It appears that they have gone as far as they can go; therefore one can only wait to see if the courts right themselves back to a clear application of the Fourth Amendment wherein the rights of the individual are protected to the extent intended by the framers of the Amendment."

The history of the decisions subsequent to *Olmstead* is significant.

Of the five-man majority in *Goldman v. United States*, 316 U. S. 129 (1942), only two, Mr. Justice Black and Mr. Justice Douglas are now on the Court.[4] Both of these Justices, however, have, we believe, changed their views for they both dissented in *On Lee v. United States*, 343 U. S. 747 (1951). In so doing, Mr. Justice Douglas explained (343 U. S. at 762):

> ". . . I joined (in Goldman) in an opinion of the Court written by Mr. Justice Roberts, which adhered to the Olmstead case, refusing to overrule it. Since that time various aspects of the problem have appeared again and again in the cases coming before us. I now more fully appreciate the vices of the practices spawned by Olmstead and Goldman. Reflection on them has brought new insight to me. I now feel that I was wrong in the Goldman case. (He then quotes at length from Mr. Justice Brandeis' dissent in Olmstead.)"

And he then said (p. 765):

> "That philosophy is applicable not only to a detectaphone placed against the wall or a mechanical device designed to record the sounds from telephone wires but also to the 'walky-talky' radio used in the present case. The nature of the instrument that science or engineering develops is not important. The controlling, the decisive factor is the invasion of privacy against the command of the Fourth and Fifth Amendments."

---

[4]The only other remaining member of the Court at the time of *Goldman* is Mr. Justice Frankfurter who dissented in that case and thought *Olmstead* should be overruled (316 U.S. at 136).

The only member of the five-man majority in *On Lee* now on the Court is Mr. Justice Clark. While, concededly, not addressing himself to the precise problem here, we believe it is not without significance that in writing for the Court in *Mapp v. Ohio*, 367 U. S. 643, 659 (1961), which overruled *Wolf v. Colorado*, 338 U. S. 25 (1949), Mr. Justice Clark took occasion to rely upon the dissenting opinion of Mr. Justice Brandeis in *Olmstead*. True, in concurring in *Silverman v. United States*, 365 U. S. 505 (1961), to be discussed below, Mr. Justice Clark, as well as Mr. Justice Whittaker, seemed to be using the language of trespass, nevertheless, as we say, the reliance on Mr. Justice Brandeis' dissent in *Olmstead* is not without significance.

The Court's continued acceptance of the rationale of Mr. Justice Holmes' and Mr. Justice Brandeis' dissents in *Olmstead* is seen from its reliance thereon in *Elkins v. United States*, 364 U. S. 206, 222-223 (1960) which overturned the "silver-platter" doctrine.

Silverman v. United States, 365 U. S. 505 (1961), is, of course, a significant case. While it is true that a reading of the case leaves one with the impression that the Court was still relying on the trespass doctrine, refusing to re-examine *Goldman* while also refusing to extend it by even a fraction of an inch, yet it is noteworthy, we think, that the Court quoted (365 U. S. at 512, f.n. 4) from Judge Jerome Frank's dissenting opinion in *On Lee* in the Court of Appeals (*United States v. On Lee*, 193 F. 2d 306, 315, 316 (CA 2, 1951); see also p. 317). Moreover, quite frankly, we have difficulty in seeing an actual trespass in *Silverman*. The Government's brief in that case, extracts

of which (from pages 5-6) we set out in the margin,[5] only adds to our inability.

In any event, we submit, the question is significant and important enough and the present status of the trespass doctrine sufficiently unclear to justify a hearing in this case.

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

A. L. WIRIN,
FRED OKRAND,
Attorneys for Amicus Curiae.

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[5] "The officers had an electronic amplifying device consisting of a small battery-operated amplifier and earphones to which was attached an antenna referred to as a 'needle' or 'spike.' It was not a true spike, as it could not be driven into a wall, due to the delicacy of the needle (R. 102-103, 161). The needle was 11¾ inches in length (R. 102). . . . The officers searched along the second floor wall in No. 410, adjoining No. 408, for a crack into which the needle could be partially inserted, employing a trial-and-error probing under the baseboard with the wire of a straightened clothes-hanger (R. 115, 141-142). They did not remove or tamper with the baseboard (R. 116, 142) and they did not make a hole anywhere (R. 100).

"The officers ultimately discovered a crevice extending part way into the party wall from a point between the floor and baseboard in the front room. This crevice was employed thereafter (R. 100, 115-117). The party wall was 13 to 14 inches thick and the officers testified that they inserted the needle only about 5½ or 5⅞ inches, half of its length, at which point something solid blocked further insertion (R. 84, 100, 103-104, 122-123, 143, 148; *cf.* 'Possibly' 6½ inches, R. 161). . . ."

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 627

VINCENT D. TODISCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. II,[1] Pet. App. 1–8) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1961 (R. II, Pet. App. 9). A petition for rehearing was denied on November 29, 1961 (R. II, Pet. App. 10). The petition for a writ of certiorari was filed on December 22, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Unless otherwise specified, record references are to Volumes III *et seq.* of the transcript of trial proceedings.

QUESTION PRESENTED

Whether petitioner's conversations with a federal agent, which were held in petitioner's office to which the agent had been invited and which were transmitted by a concealed radio on the person of the agent and recorded at the receiving point, were admissible at trial to show the attempted bribery of the agent.

STATUTES INVOLVED

Section 301 of the Federal Communications Act (48 Stat. 1081, 47 U.S.C. 301) provides in part:

> License for Radio Communication or Transmission of Energy
>
> It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio * * * except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Section 318 of the Federal Communications Act (48 Stat. 1089, as amended, 47 U.S.C. 318) provides in part:

> Operation of Transmitting Apparatus
>
> The actual operation of all transmitting apparatus in any radio station for which a sta-

> tion license is required by this Act shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission * * *.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of attempting to bribe a federal internal revenue agent, in violation of 18 U.S.C. 201 (R. I, 29). He was sentenced to imprisonment for 1 year and 1 day—the service of the sentence to be suspended—and to pay a fine of $500 (R. I, 30). The court of appeals affirmed (R. II).

The evidence at the trial is not disputed here. At the time of the crime, petitioner, a practicing attorney, was negotiating with an internal revenue agent, Oto, to reach a compromise settlement of a client's tax liability (R. 14–39, 313–322, 188–189). Because petitioner had made certain overtures to Oto suggesting a reward for his help, the agent, on subsequent visits to petitioner's office, concealed underneath his tie a small miniature radio transmitter (R. 24–34, 43–52). His conversations with petitioner were transmitted outside to other agents and recorded at the receiving point (R. 43, 50). The resulting tapes constituted the government's proof of the attempted bribery (R. 103–171, 378 *et seq.*).

ARGUMENT

Petitioner's contention, that the radio-transmitted evidence of his propositions made in his law office to an internal revenue agent was constitutionally inadmissible at trial, is answered in full by *On Lee* v. *United States*, 343 U.S. 747. In that case the defendant's incriminating statements made in his place of business to an undercover agent were transmitted, as here, by a radio concealed on the person of the agent to another agent listening outside. In holding that the testimony of the listening agent was admissible at trial, this Court rejected contentions that the conduct of the agents amounted to an unlawful search and seizure as proscribed by the Fourth Amendment, or to trespass, or to a violation of the Federal Communications Act. The facts and the reasoning of that case are dispositive of the issues here.

1. Petitioner, in an attempt to distinguish *On Lee*, lists differences which are irrelevant. He characterizes the laundry in *On Lee* (the place of conversation) as a "place to which the public was invited generally" and the law office in the instant case as a "private law office"; and he describes *On Lee* and the undercover agent as "old acquaintance[s]" and petitioner and agent Oto as "mere business acquaintances" (Pet. 15–16). But these differences are matters going only to the question of trespass. In the present case, the evidence indicates that agent Oto was in petitioner's office by express invitation. The record is replete with references to occasions, in addition to the day of the crime, on which petitioner called the agent to ask that he come to his office (R. 152, 164, 175, 176; see

petitioner's testimony, R. 316, 347, 351). Even if, as petitioner asserts (Pet. 16), agent Oto did "affirmatively" falsify his reason for coming, this factor would be of no importance to the outcome of the present case. This court in *On Lee* rejected the fine-spun doctrine of trespass *ab initio* because of entry obtained by fraud. The Court said that, only in the case of physical entry by force, or by unwilling submission to authority, or without any express or implied consent, would the problem of trespass be present (343 U.S. at 752–753). Clearly, if there be a difference, petitioner's position is less favorable than that of the petitioner in *On Lee,* because Oto was present in petitioner's office by express invitation rather than by implied consent.[2]

There is here no "unauthorized physical encroachment within a constitutionally protected area." *Silverman* v. *United States,* 365 U.S. 505, 510. As the court below said (Pet. App. 4):

> The right which appellant here asserts would seem to be little more than the right to rely upon Oto's apparent inability to produce proof beyond his own testimony of the substance of

[2] The remaining purported distinction—the argument that here as opposed to *On Lee* the evidence was secured after a complaint had been filed against petitioner (Pet. 15)—is without basis either in fact or law. Quite apart from what may have been pending in the present case, the charge of which petitioner was convicted was that of an attempted bribery on or about April 6, 1960 (see indictment, p. 1, R. I), the date on which petitioner was arrested after the last tape had been recorded (R. 281). The indictment was returned on June 15, 1960 (R. I). Moreover, in *On Lee*, the petitioner was at large on bail pending trial when the incriminating statements were made.

> the conversation in which he engaged with appellant. This has little relation to an intrusion upon privacy which is the problem at the heart of the constitutional issues presented by eavesdropping.[*]

2. The case of *On Lee* is likewise dispositive of petitioner's contention (Pet. 19–21) that the agent's failure to have a license as required by Sections 301 and 318 of the Federal Communications Act (*supra*, pp. 2–3) rendered the proof inadmissible. The broad purpose of these licensing sections, as well as that of Section 605 involved in *On Lee*, is to prevent interference with communications. As in *On Lee*, petitioner was not operating a system of communications within the Act (see 343 U.S. at 754). As the court below noted (Pet. App. 6), no federally protected right of petitioner was violated by the agent's lack of an F.C.C. license. No public policy is therefore violated by the admission of the evidence here. See *Nardone* v. *United States*, 302 U.S. 379.

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[*] In its Brief Amicus Curiae, pp. 2–7, the American Civil Liberties Union argues that the rationale of *On Lee* should be reexamined in the light of recent and projected developments in the science of electronics which threaten to invade our right of privacy. The same argument was made in *Silverman* v. *United States*, *supra*, 365 U.S. at 508–509. The Court there answered those arguments as follows (*id.* at 509): "The facts of the present case * * * do not require us to consider the large questions which have been argued. We need not here contemplate the Fourth Amendment implications of these and other frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society. Nor do the circumstances here make necessary a re-examination of the Court's previous decisions in this area."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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